

Respondent argues that the issue raised by claimant is not appealable and therefore claimant's application for review should be dismissed.

The issues for Board determination are:

1. Does the Board have jurisdiction to review the issue raised by claimant?
2. If so, did the ALJ err in admitting and considering evidence of impairment that lacked the foundation required by K.S.A. 2012 Supp. 44-501(b)?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Derrick Holloway, a chain hand for respondent's drilling company, had been employed by respondent for approximately two months when he sustained an accidental injury on November 30, 2012. Claimant described the accident as follows:

A. We had just made connection. I walked to the back side, what we call the meat board where we stack the pipe at. I grabbed a water hose, I walked back around and I was washing the floor off. My driller was just high into the kelly to start drilling and there was two hose clamps on the red hose; water hose. One of those clamps caught the pushing. As it went around, it went around once and my driller stood behind me at the chrome. Said, "Ah shit." Sorry. So I took it -- I've been doing it for a while -- that he was going to take the cable out and I reached down to grab the hose and as it came around, it got stuck in the sleeve of my sweater. And I was trying to get it out and the next thing I remember is, it sucked me into the kelly and my legs went out and I'm spinning around bouncing off the tongs and a set of collars. And instead of kicking the table out, I was told that he froze. And when he froze, he hit the throttle --

A. I went around for 13 to 18 seconds, estimated at 120 miles an hour. As fast as the rig would go. And the driller was standing at the controls, which he could have kicked into high drum and low drum and killed it right there. I would have never went around in a circle at all. So something happened there. I don't know what. I was going around in circles.²

Claimant fractured his right arm and right leg. He also alleged his back was injured. Claimant's right humeral shaft fracture and right tibia/fibula shaft fracture were treated surgically by Dr. Bradley Dart.

² P.H. Trans. at 6-7.

Claimant was the only witness who provided live testimony. Based on his Fifth Amendment right against self incrimination, claimant refused to answer questions about his drug use. Accordingly, respondent did not cross-examine claimant. However, the parties offered into evidence a number of exhibits which are summarized as follows:

1. Claimant's Exhibit 1, treatment records of Dr. Dart.
2. Claimant's Exhibit 2, a copy of the Board's Order in *Jones v. Junction City Wire*, No. 1,059,933, 2013 WL 485708 (Kan. WCAB Jan. 31, 2013).
3. Respondent's Exhibit 1, the affidavit of Erin Beach, the manager of Kelly Compliance, a drug testing company. Ms. Beach had been a certified drug tester for over 10 years. Ms. Beach unsuccessfully attempted to collect a urine sample from claimant; however, a sample was ultimately obtained by an employee of Kelly Compliance on December 4, 2012, 4 days after the accidental injury.
4. Respondent's Exhibit 2, the affidavit of Gary Talbott, respondent's operations manager. After claimant's accident, Mr. Talbott requested that Kelly Compliance perform a drug test under respondent's drug testing policy. Mr. Talbott indicated claimant was presented with the drug testing policy when he was hired. Claimant signed an acknowledgment that he had received and read the policy before he was hired. Claimant was hired by respondent on October 8, 2012.
5. Respondent's Exhibit 3, respondent's written drug testing policy, which provides that the employee is required to submit to post-accident drug testing by, if requested, providing a urine sample within 32 hours after an accident, but no later than 32 hours after the accident.
6. Respondent's Exhibit 4, the results of the drug testing of claimant's urine sample, which was positive for marijuana metabolite at 50 ng/ml.
7. Respondent's Exhibit 5, an undated document, signed by claimant, entitled "ACKNOWLEDGMENT, WAIVER AND AGREEMENT WITH RESPECT TO DRUG AND ALCOHOL TESTING."
8. Respondent's Exhibit 6, respondent's first report of injury or illness.
9. Respondent's Exhibit 7, the affidavit of Stacie Tucker, a DOT-certified drug and alcohol testing technician employed by Kelly Compliance, with over 9 years of experience. According to Ms. Tucker, to become DOT-certified, a technician must "attend a class, pass a written exam, and complete five (5) mock collections where each collection has a problem that has to be solved." Ms. Tucker collected a urine sample from claimant, who was still hospitalized due to his injuries, on the evening of December 4, 2012. The collection of the sample was not a DOT test, but Ms. Tucker followed DOT procedures

regarding ensuring the quality of the sample. Ms. Tucker described the chain of custody of the sample up to the point when the sample was conveyed to Clinical Reference Lab (CRL), where the sample was tested.

10. Respondent's Exhibit 8, the affidavit of Dr. David Kuntz, the director of the Clinical Reference Lab located on Quivira Road in Lenexa, Kansas. Mr. Kuntz described in detail the chain of custody and testing method utilized by CRL. CRL is approved by the United States Department of Health and Human Services and licensed by the Department of Health and Environment.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501(b) provides in part:

(1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

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(C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

Confirmatory test cutoff levels (ng/ml)

Marijuana metabolite ¹	15
Cocaine metabolite ²	150
Opiates:	
Morphine.	2000
Codeine.	2000
6-Acetylmorphine ⁴	10 ng/ml
Phencyclidine.	25
Amphetamines:	
Amphetamine.	500
Methamphetamine ³	500

¹ Delta-9-tetrahydrocannabinol-9-carboxylic acid.

² Benzoyllecgonine.

³ Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

⁴ Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

(B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;

(E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and

(F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

ANALYSIS

The undersigned Board Member finds the Board does not have jurisdiction of the issue raised by claimant and accordingly dismisses the appeal.

Respondent advances the position that the Board lacks jurisdiction of the issue raised by claimant because an evidentiary ruling concerning the admissibility of evidence is not a jurisdictional issue as set forth in K.S.A. 44-534a. The Board has held that on review of a preliminary hearing order, the Board has jurisdiction to consider issues concerning whether a respondent has or has not successfully satisfied its burden to prove an intoxication defense. In *Gutierrez*,³ the Board held:

The Board has held that the term “certain defenses” applies to issues that go to the compensability of the claim. The intoxication defense contained in K.S.A. 2006 Supp. 44-501(d) makes an otherwise compensable work-related accident noncompensable when the injury was contributed to by an employee’s use of certain drugs, including marijuana. Accordingly, the issue of whether claimant was intoxicated and, if so, whether claimant’s injury was contributed to by his use of marijuana constitutes a “certain defense” under K.S.A. 44-534a(a)(2). As such, the Board has jurisdiction of that issue at this juncture of the proceedings.

In *Thill*,⁴ the Board ruled:

The Appeals Board has previously held that the intoxication defense contained in K.S.A. 1996 Supp. 44-501(d)(2) is the type of defense contemplated by K.S.A. 1996 Supp. 44-534a. See *Lacerte v. Marks Homes, Inc.*, Docket No. 175,893 (May 1996); *Cockerham v. Nichols Fluid Service*, Docket No. 201,867 (Feb. 1996); *Sexton v. Barrett Cement Company*, Docket No. 193,688 (Nov. 1995); *Wolford v. Osman Construction*, Docket No. 196,863 (May 1995); *Stroud v. Val Gottschalk D/B/A Valentine Roofing & Waterproofing, Inc.*, Docket No. 195,244 (March 1995);

³ *Gutierrez v. Diebolt*, No. 1,032,056, 2007 WL 4296027 (Kan. WCAB Nov. 30, 2007).

⁴ *Thill v. Monfort, Inc.*, No. 214,119, 1997 WL 557534 (Kan. WCAB Aug. 14, 1997).

Cooper v. Exide Corporation, Docket No. 184,696 (Jan. 1995). The Board has jurisdiction to hear this appeal from a preliminary hearing order.

However, the Board has not ruled consistently on the issue of whether the Board has jurisdiction, on appeal from a preliminary hearing order, to review an issue regarding the admissibility of the results of post-accident drug testing. In *Decker*,⁵ the Board, under these circumstances, did exercise jurisdiction and ruled on whether the ALJ erred in admitting the results of a post-injury drug test.⁶

The Board has also held that, on appeal from a preliminary hearing order, it has no jurisdiction to review an issue regarding the admissibility of drug testing. In *Lodwick*,⁷ it was held:

The issue whether drug testing results should be admitted into evidence at a preliminary hearing is not a jurisdictional issue listed in K.S.A. 44-534a that is subject to review in an appeal of a preliminary hearing order. Moreover, there is no question an administrative law judge has the authority to make evidentiary rulings at a preliminary hearing. Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

In *Hutchinson*,⁸ it was ruled:

The ALJ's evidentiary ruling on the admissibility of the drug test results was an interlocutory ruling that was within the ALJ's jurisdiction to decide. . . . The Board is without jurisdiction to decide this issue on an appeal from a preliminary hearing.

In *Hicks*,⁹ a Board member found:

As with other evidentiary questions at preliminary hearing, the ALJ is charged with the responsibility of determining whether the evidence proffered has sufficient reliability, relevance and foundation to be considered, knowing that the hearing is summary in nature.

⁵ *Decker v. Southwind Drilling, Inc.*, No. 1,064,078, 2013 WL 3368497 (Kan. WCAB Jun. 12, 2013).

⁶ See *Jones v. Junction City Wire Harness*, No. 1,059,933, 2013 WL 485708 (Kan. WCAB Jan. 31, 2013).

⁷ *Lodwick v. Webster Engineering & Manufacturing Co., Inc.*, No. 1,030,167, 2007 WL 435901 (Jan. 18, 2007).

⁸ *Hutchinson v. U.S.D.* 259, Nos. 1,033,518 & 1,033,519, 2010 WL 769931 (Kan. WCAB Feb. 12, 2010).

⁹ *Hicks v. Butler Transport, Inc.*, No. 1,026,648, 2006 WL 2328107 (Kan. WCAB Jul. 14, 2006).

The Board finds an administrative law judge has the authority at a preliminary hearing to determine whether the respondent has met all the foundation requirements for a chemical test to be admitted into evidence. The Board finds the ALJ did not act arbitrarily or capriciously in her exclusion of the proffered documents and, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen result.

The *Garcia*¹⁰ case considered the same issue:

The Board finds the ALJ did not act arbitrarily or capriciously in her admission of the proffered documents and, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen result.

The sole issue raised by claimant is whether the ALJ erred in admitting the results of claimant's post-accident drug screen into evidence at the preliminary hearing.

The issue of jurisdiction must begin with the language used by the legislature in enacting K.S.A. 44-534a(a)(2) and K.S.A. 44-551(i)(1), which define the limits of the Board's jurisdiction when a party requests Board review of a preliminary hearing order. Evidentiary rulings by an ALJ are not listed as jurisdictional in K.S.A. 44-534a(a)(2). Nor are evidentiary rulings subject to Board review under K.S.A. 44-551(i)(1), unless the ALJ exceeds his or her jurisdiction in granting or denying the relief requested at the preliminary hearing. There is no indication in K.S.A. 44-501(b), or elsewhere in the Act, that rulings on the admissibility of the results of post-accident drug or alcohol testing are subject to Board review at the preliminary stage of a pending claim.

It is well within an ALJ's authority to rule on evidentiary issues. Moreover, it is incumbent on an ALJ to rule on the admissibility of evidence, including the admissibility of drug and alcohol testing results. There is no indication in the record that Judge Fuller exceeded her authority in ruling on the admissibility of the drug testing conducted after claimant's accident, nor is there any indication that the ALJ abused her discretion in deciding whether such test results should be admitted into evidence. The record does not support the notion that the ALJ acted arbitrarily or capriciously in her evidentiary ruling that the drug test results were admissible.

This Board Member finds that, under the circumstances of this claim, the Board is without jurisdiction to review the evidentiary ruling made by the ALJ on appeal from the ALJ's preliminary hearing Order. The matter should accordingly be dismissed by the Board

¹⁰ *Garcia v. ADM Farmland*, No. 1,007,078, 2003 WL 21962903, (Kan. WCAB Jul. 10, 2003).

for lack of jurisdiction. It should be noted that the decision in this claim reflects the opinion of one Board member alone and the decision does not necessarily reflect the opinions of the remaining Board Members.

CONCLUSION

This Board Member finds that there is no jurisdiction to consider the issue raised by claimant in his request for Board review of the ALJ's preliminary hearing Order and that the request for Board review should be dismissed for lack of jurisdiction.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹²

WHEREFORE, the undersigned Board Member finds that the Board is without jurisdiction to review claimant's application for Board review of the issue of the admissibility of claimant's post-accident drug testing results. The application is therefore dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this 19th day of September, 2013.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge

¹¹ K.S.A. 2012 Supp. 44-534a.

¹² K.S.A. 2012 Supp. 44-555c(k).